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COSTCO WHOLESALE CORPORATION;
MAPLEBEAR INC. d/b/a INSTACART

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KRISTINA A. BIENEK, an individual,

Plaintiff,

v.

AFFINITYLIFESTYLES.COM, INC.
d/b/a REAL WATER, a Nevada
corporation; REAL WATER INC., a
Delaware Corporation; COSTCO
WHOLESALE CORP., a Delaware
Corporation; MAPLEBEAR, INC. d/b/a
INSTACART, a Delaware Corporation;
DOES 2 through 10, inclusive; ROE
CORPORATIONS 11 through 20,
inclusive; and ABC LIMITED LIABILITY
COMPANIES 21 through 30, inclusive,

Defendants.

Case No. 2:21-cv-02005-APG-DJA

**FURTHER STIPULATION BETWEEN
DEFENDANTS MAPLEBEAR INC. d/b/a
INSTACART, COSTCO WHOLESALE
CORPORATION,
AFFINITYLIFESTYLES.COM, INC. d/b/a
REAL WATER, AND REAL WATER INC.
AND PLAINTIFF KRISTINA A. BIENEK
AND ~~[PROPOSED]~~ ORDER TO STAY
DISCOVERY**

Complaint Filed: July 30, 2021
Removal Date: November 5, 2021

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RECITALS

Plaintiff Kristina A. Bienek (“Plaintiff”) and Defendants Mapbear Inc. d/b/a Instacart (“Instacart”), Costco Wholesale Corporation (“Costco”), AffinityLifestyles.com, Inc. d/b/a Real Water (“AffinityLifestyles.com, Inc.”), and Real Water Inc. (“Real Water”) (collectively the “Parties”), by and through their respective counsel of record, do hereby stipulate and respectfully request an order staying all discovery in this matter pending resolution of Instacart’s and Costco’s Motion to Compel Arbitration and Stay the Case, or, Alternatively, to Dismiss for Failure to State Claims for Relief Pursuant to Rule 12(b)(6) [ECF Dkt. No. 7].

On July 30, 2021, Plaintiff filed this matter in Eighth Judicial District Court, Clark County, Case No. A-21-838724-C. On November 5, 2021, Costco and Instacart removed this action to the United States District Court for the District of Nevada. *See* Petition for Removal [ECF Dkt. No. 1]. On November 26, 2021, Plaintiff filed a Motion to Remand to State Court (“Plaintiff’s Motion”). *See* Plaintiff’s Motion [ECF Dkt. No. 18]. On December 10, 2021, Costco and Instacart filed a response to Plaintiff’s Motion. *See* Costco’s and Instacart’s Response [ECF Dkt. No. 21]. On December 17, 2021, Plaintiff filed her reply brief in support of her Motion. *See* Plaintiff’s Reply [ECF Dkt No. 25]. In light of Plaintiff’s pending Motion, on January 18, 2022, the Parties entered into a Stipulation and Proposed Order to Stay Discovery, which the Court granted on January 20, 2022 [ECF Dkt Nos. 30 and 31]. On February 23, 2022, the Court denied Plaintiff’s Motion to Remand [ECF Dkt No. 34].

On November 12, 2021, Instacart and Costco filed a Motion to Compel Arbitration and Stay the Case, or, Alternatively, to Dismiss for Failure to State Claims for Relief Pursuant to Rule 12(b)(6) (“Defendants’ Motion” or “Instacart’s and Costco’s Motion”). *See* Defendants’ Motion [ECF Dkt. No. 7]. On November 26, 2021, Plaintiff filed a response to Defendants’ Motion. *See* Plaintiff’s Response [ECF Dkt. No. 17]. On December 3, 2021, Instacart and Costco filed their reply brief in support of Defendants’ Motion. *See* Defendants’ Reply [ECF Dkt. No. 20]. Instacart’s and Costco’s Motion is fully briefed and remains pending before this Court.

On October 8, 2021, the United States Bankruptcy Court for the District of Nevada entered an Order Approving Stipulation Allowing Claimants Relief From The Automatic Stay To Liquidate

1 Alleged Personal Injury Claims In State Court Litigation [ECF Dkt No. 16], which allowed
 2 AffinityLifestyles.com, Inc. and Real Water to proceed with discovery and evidence preservation.
 3 Costco, Instacart, and Plaintiff are likewise not precluded from preserving evidence.

4 Courts have broad discretionary power to control discovery including the decision to allow
 5 or deny discovery. *See, e.g., Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988). In cases
 6 like this, a temporary stay of discovery will promote the goals of Rule 1 of the Federal Rules of
 7 Civil Procedure, “to secure the just, speedy, and inexpensive determination” of this action –
 8 conserving judicial resources and promoting a more efficient disposition of the threshold
 9 jurisdictional and venue issues, which should be made at the earliest stage of litigation. Moreover,
 10 under Rule 26(c)(1), a court may issue an order to protect a party or person from annoyance,
 11 embarrassment, oppression, or undue burden or expense, including forbidding discovery. Fed. R.
 12 Civ. P. 26(c)(1).

13 Although a pending motion to dismiss is “not ordinarily a situation that in and of itself
 14 would warrant a stay of discovery,” when the motion challenges jurisdiction or venue, or immunity,
 15 a stay is proper. *See Twin City Fire Ins. Co. v. Employers Ins. of Wausau*, 124 F.R.D. 652, 653 (D.
 16 Nev. 1989); *Turner Broadcasting System, Inc. v. Tracinda Corp.*, 175 F.R.D. 554, 556 (D. Nev.
 17 1997); *see also Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 602 (D. Nev. 2011) (matters dealing
 18 with “preliminary issues of jurisdiction, venue, or immunity” typically warrant a stay of discovery).

19 Courts in this district have stayed discovery where, as here, a “preliminary peek” at the
 20 merits of the pending motion demonstrated: “[f]irst, the pending motion must be potentially
 21 dispositive of the entire case or at least dispositive on the issue on which discovery is sought.
 22 Second, the court must determine whether the pending potentially dispositive motion can be
 23 decided without additional discovery.” *Tradebay, LLC*, 278 F.R.D. at 602. Further, this district
 24 has held that matters dealing with “preliminary issues of jurisdiction, venue, or immunity” typically
 25 warrant a stay of discovery. *Id.* at 603. Instacart’s and Costco’s Motion raises threshold issues of
 26 whether or not this matter may even be heard in this forum and it will dictate the extent of any
 27 discovery necessary, if any. Accordingly, Instacart’s and Costco’s Motion is dispositive. Further
 28 discovery is not needed to resolve Instacart’s and Costco’s Motion.

Furthermore, this Court has wide discretion to control the conduct of pretrial discovery by any party to the action, and courts have routinely stayed pre-trial obligations, including merits discovery, when a motion to compel arbitration was pending before the court. *See Kidneigh v. Tournament One Corp.*, 2013 WL 1855764, at *2 (D. Nev. May 1, 2013) (staying discovery pending decision on motion to compel arbitration and dismiss, reasoning that “[t]he issues before the Court in the pending dispositive motion do not require further discovery and are potentially dispositive of the entire case[.]”); *see also Andrus v. D.R. Horton, Inc.*, 2012 WL 1971326 (D. Nev. June 1, 2012) (granting defendant’s motion to stay discovery pending ruling on defendant’s motion to compel arbitration); *Steiner v. Apple Computer, Inc.*, No. C 07-4486 SBA, 2007 WL 4219388, at *1 (N.D. Cal. Nov. 29, 2007) (“Indeed, [stay in discovery] is a common practice while motions to compel are pending.”); *Cunningham v. Van Ru Credit Corp.*, 2006 WL 2056576, at *2 (E.D. Mich. July 21, 2006) (staying merits discovery pending resolution of motion to compel arbitration); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Coors*, 357 F.Supp.2d 1277, 1281 (D. Colo. 2004) (court issued a stay of “all discovery and pretrial scheduling” pending resolution of motion to compel arbitration).

The Parties agree that no prejudice will result by granting the stipulation to stay discovery at this juncture. The Parties agree that given that at this early stage in the litigation there is no scheduling order in place, a case management conference with the Court has not yet been scheduled, deadlines for fact and expert discovery have not yet been established, and Instacart’s and Costco’s Motion is fully briefed, a stay is appropriate and would not result in prejudice to the Parties or limit their ability to conduct discovery in the event that the Court denies Defendants’ Motion. Therefore, in order to avoid the hardship or inequity the Parties would suffer should the case immediately proceed despite Instacart’s and Costco’s Motion, the Parties stipulate to a limited stay of discovery in this action until the Court issues decisions on Defendants’ Motion, such that discovery will be stayed with the exception that the Parties shall be permitted to continue their evidence preservation efforts, including, but not limited to, attending inspections relating to facilities previously operated by Defendants AffinityLifestyles.com, Inc. and Real Water Inc. or similar evidentiary preservation events that are noticed by the Parties in the companion Real Water cases in state court, as long as

notice is given to the Parties in this matter as to such events. Proceeding in this manner would preserve both judicial and party resources and promote efficiency.

STIPULATION

IT IS HEREBY STIPULATED by and between the Parties as follows:

1. WHEREAS, discovery is stayed pending a decision on Instacart's and Costco's Motion to Compel Arbitration and Stay the Case, or, Alternatively, to Dismiss for Failure to State Claims for Relief Pursuant to Rule 12(b)(6), with the exception that the Parties shall be permitted to continue their ongoing efforts to preserve evidence, including, but not limited to, attending inspections relating to facilities previously operated by Defendants AffinityLifestyles.com, Inc. and Real Water Inc. or similar evidentiary preservation events that are noticed by the Parties in the companion Real Water cases in state court, as long as notice is given to the Parties in this matter as to such events.

2. WHEREAS, alternatively, in the event that the Court denies Instacart's and Costco's Motion, the Parties shall conduct an Rule 26(f) Conference and then submit a proposed Joint Discovery Plan and Scheduling Order within forty-five (45) days of the Court's decision on Defendants' Motion.

3. WHEREAS, the Court shall set a status conference within six (6) months of this Order. In the event that the Court issues its decision on Instacart's and Costco's Motion prior to the status conference, the status conference shall be vacated.

4. WHEREAS, this Stipulation is made in good faith and to preserve the resources of the judicial system and the Parties, is not interposed for delay, and is not filed for an improper purpose.

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1 IT IS SO STIPULATED.

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3 Dated: April 13, 2022

Dated: April 13, 2022

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5 By: /s/ Alexandra B. McLeod
Christian M. Morris (SBN 11218)
Alexandra B. McLeod (SBN 8185)
6 **NETTLES | MORRIS**

7 Attorneys for Plaintiff
8 KRISTINA A. BIENEK

By: /s/ Noushan Nouredдини
Kelley S. Olah (*Pro Hac Vice*)
Noushan Nouredдини (*Pro Hac Vice*)
9 **BARNES & THORNBURG LLP**

Michael A. Federico (SBN 005946)
10 **OLSON CANNON GORMLEY &
STOBERSKI**

Attorneys for Defendants
COSTCO WHOLESALE
CORPORATION; MAPLEBEAR INC.
d/b/a INSTACART

11
12 Dated: April 13, 2022

13
14 By: /s/ Joel D. Odou
Joel D. Odou
Jason W. Williams (SBN 8310)
15 Xheni Ristani
L. Renee Green
16 **WOOD, SMITH, HENNING &
BERMAN LLP**

Attorneys for Defendants
17 AFFINITYLIFESTYLES.COM, INC.
d/b/a REAL WATER; REAL WATER
18 INC.

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20
21 **SIGNATURE ATTESTATION**

22 I hereby attest that I have obtained the concurrence of Alexandra B. McLeod, counsel for
23 Plaintiff Kristina A. Bienek, and Joel D. Odou, counsel for Defendants AffinityLifestyles.com, Inc.
24 and Real Water Inc., for the filing of this stipulation.

25
26 By: /s/ Noushan Nouredдини
Noushan Nouredдини
27
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ORDER

Pursuant to the Parties' stipulated request, discovery is stayed pending a decision on Instacart's and Costco's Motion to Compel Arbitration and Stay the Case, or, Alternatively, to Dismiss for Failure to State Claims for Relief Pursuant to Rule 12(b)(6), with the exception that the Parties shall be allowed to continue their evidence preservation efforts, including, but not limited to, attending inspections relating to facilities previously operated by Defendants AffinityLifestyles.com, Inc. and Real Water Inc. or similar evidentiary preservation events that are noticed by the Parties in the companion Real Water cases in state court, as long as notice is given to the Parties in this matter as to such events. Alternatively, in the event that the Court denies Defendants' Motion, the Parties shall conduct a Rule 26(f) Conference and then submit a proposed Joint Discovery Plan and Scheduling Order within forty-five (45) days of the Court's decision on Defendants' Motion. The Court declines to set a status conference.

Accordingly, IT IS ORDERED that the Stipulation is granted in part and denied in part.

DATED this 15th day of April, 2022.



DANIEL J. ALBREGTS
UNITED STATES MAGISTRATE JUDGE